



SPECIAL REPORT | FAMILY LAW

Same-Sex Marriage Opens a New Frontier in Tort Law

Commentary by Stephen F. Rosenthal

A little-noticed byproduct of the recent, historic marriage equality rulings is that married gay and lesbian couples in Florida now enjoy equal protection under state laws protecting tort victims.

Prior to the lifting of the stay on U.S. District Judge Robert Hinkle's injunction against the enforcement of Florida's laws banning same-sex marriage and denying legal recognition of same-sex marriages performed in other states, same-sex couples lacked standing to sue for damages caused by the death or severe injury of their life partner as a result of a tortfeasor's misconduct. That is because the Florida Wrongful Death Act defines a "survivor" as "the decedent's spouse," § 768.18(1), Fla. Stat., and a loss of consortium claim could not be brought by an unmarried partner. See *Bashaway v. Cheney Bros.*, 987 So. 2d 93 (Fla. 1st DCA 2008) (rejecting same-sex partner's loss of consortium claim).

Until Jan. 6, 2015 (or Jan. 5, as a result of Judge Sarah Zabel's decision to lift the stay on her ruling in Miami-Dade County), no same-sex couple could claim spousal status under the Florida Wrongful Death Act, even if legally married in another state, due to Florida's non-recognition statute, §741.212, Fla. Stat. and Article I, § 27 of the state Constitution. Those discriminatory provisions have since been enjoined as violative of the U.S. Constitution.

As a result of the historic same-sex marriage rulings, if a same-sex couple has lawfully wed in Florida or elsewhere,



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and one spouse is killed in an accident, the survivor is no longer a stranger in the eyes of the law, but is instead entitled to the full damages a surviving spouse may recover under the Wrongful Death Act: lost support and services, loss of companionship and protection, and mental pain and suffering. §768.21, Fla. Stat.

In addition, as a surviving spouse, if the decedent dies intestate, the same-sex spouse now has preference for the appointment as the personal representative of his or her deceased spouse's estate. §733.301(1)(b), Fla. Stat.

This newfound legal protection should extend to cases involving a same-sex spouse who was killed before Jan. 6 as a result of tortious conduct. If the couple was married in another state, the same-

sex marriage rulings have removed the obstacle to the recognition of that marriage in Florida, and hence the surviving spouse's legal standing to sue. So long as the claim is brought within the two-year statute of limitations governing wrongful death claims, these claims for damages should be viable in Florida courts.

Likewise, in the event of a catastrophic personal injury to one member of a same-sex couple who was previously married out-of-state, the spouse's loss of consortium claims have effectively matured. Complaints in ongoing litigation involving the serious personal injury to a married gay or lesbian plaintiff can now be amended to add a loss of consortium claim for the spouse.

A MORE DIFFICULT QUESTION

Cases involving the wrongful death of an unmarried member of a same-sex couple present a more difficult question.

Courts in states with a history of recognition of same-sex marriages have reached different results on the question of whether marital status can be conferred retroactively for purposes of asserting tort claims.

The Connecticut Supreme Court recently held that a same-sex spouse could assert a loss of consortium claim even though she was not married at the time of the injury to her partner, as long as she alleged that she would have married had state law not prohibited them from doing so. See *Mueller v. Tepler*, 95 A.3d 1101 (Conn. 2014).

The Massachusetts Supreme Judicial

Court, however, declined to allow such a claim. See *Charron v. Amaral*, 889 N.E.2d 946 (Mass. 2008). And in California, the Legislature granted retroactive tort protection to same-sex couples. See *Armijo v. Miles*, 127 Cal. App.4th 1405 (Cal. Ct. App. 2005). It remains to be seen how Florida courts will address these new questions.

There also remains the question of what happens if Hinkle's ruling is not ultimately affirmed by the U.S. Court of Appeals for the Eleventh Circuit, or by the U.S. Supreme Court, which is expected to issue a ruling on the constitutionality of same-sex marriage bans by summer.

In states where there has been a reversal on appeal of marital status granted to same-sex couples, courts have held that to strip couples of their lawfully obtained marital status in the interim would itself violate due process. See *Caspar v. Snyder*, 2015 WL 224741 (E.D. Mich. Jan. 15, 2015) (collecting cases).

Should the nation's high court definitively invalidate Florida's same-sex marriage bans, this issue will not arise.

What can be said with certainty now, however, is that married same-sex couples in Florida enjoy a new right to sue for damages for the death or serious personal injury of a spouse, and tort lawyers should be advised of this new frontier.

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